IN THE SUPREME COURT OF THE UNITED STATES

No. A-531

OCTOBER TERM, 1983

GEORGE CLIFTON GILMORE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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AUTHORITIES CITED

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	)	
Petitioner,	)	
	)	
v.	)	No. A-531
	)	
STATE OF MISSOURI,	)	
	)	
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

TO: THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

George Clifton Gilmore, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Missouri, entered in the above-entitled cause on November 22, 1983. Petitioner's Motion for Rehearing was denied on December 20, 1983.

OPINION BELOW

The opinion of the Supreme Court of the State of Missouri is at present unpublished. It is Appendix A attached hereto.

JURISDICTION

The judgment of the Supreme Court of the State of Missouri affirming Petitioner's conviction of Capital Murder and affirming and assessing his penalty at death was entered November 22, 1983. Petitioner duly filed his Motion for Rehearing which was denied by the Supreme Court on December 20, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I. Whether Missouri may in concert with the Fourteenth Amendment, impose the death penalty on Petitioner, when the prosecutor, during the sentencing phase, was allowed to argue the possibility of future clemency contrary to state law.

II. Whether a sentence of death is excessive and disproportionate under the Eighth Amendment for the Petitioner

a) who took the life of his victim without means of torture or aggravated injury

b) who was "borderline mentally retarded"

c) when compared to sentences imposed in similar cases.

III. Whether the Missouri Supreme Court denied Petitioner due process of law by its failure to conduct a meaningful proportionality review as required by state law.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> "Nor shall any person be deprived of life, liberty, or property without due process of law."

Eighth Amendment to the Constitution of the United States:

> "Nor shall cruel and unusual punishment be inflicted."

Fourteenth Amendment to the Constitution of the United States:

> "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, George Clifton Gilmore, was convicted of Capital Murder under Missouri law in a jury trial on March 31, 1982. After proceeding through a separate sentencing phase mandated by Missouri law, the jury assessed his punishment at death. On direct appeal before the Missouri Supreme Court, Petitioner's conviction and sentence of death were affirmed. This petition draws into question whether Petitioner's sentence of death should have been disapproved as being excessive and disproportionate, whether Petitioner was arbitrarily denied proportionality of review as required by state law and whether the Petitioner was arbitrarily denied the benefit of prevailing state law with regard to the scope of the prosecutor's argument.

The facts adduced at trial show the Petitioner to be a thirty-three year old male who is "borderline mentally retarded" (R 605). He, in conjunction with his brother and another man entered the home of an eighty-three year old woman, with the intent to commit a robbery. The men ransacked the house looking for valuables. At some point one of the robbers inadvertently mentioned the Petitioner's name in front of the victim. The Petitioner then, in an apparent effort to preserve his anonymity, shot the victim twice in the chest with a .32 calibre pistol. The victim apparently died within seconds and was otherwise unharmed. The Petitioner and his companions then fled, having taken some items of small value. Evidence of the Petitioner's five felony convictions was introduced at trial as well as his admission to the commission of two other murders. The Petitioner denied any involvement in the crime.

In order to allow the imposition of the death penalty the jury must find that at least one of the statutory aggravating circumstances was present. 565.012.5 RSMo. 1977. In this case the jury was instructed on and found that "the offender committed the offense of capital murder for himself or another, for the purpose of receiving money or other thing of monetary value" (565.012.1(4) RSMo. 1978.) and that "the capital murder was committed by the Defendant for the purpose of preventing the person killed from testifying in any judicial proceeding" 565.012.1(12) RSMo. 1978.

In his argument to the jury on sentencing the prosecutor argued

> "and also you have absolutely no guarantee that the legislature down the road, here, won't change it's mind, that they won't pass another law saying that you can let someone who has been convicted like this defendant out of jail before the fifty years are up, or the Governor could commute his sentence." (R 765).

No objection was made by defense counsel, nor was any corrective instruction given by the trial judge concerning the impropriety of the prosecutor's remarks.

In its opinion on Petitioner's direct appeal the Missouri Supreme Court made no mention of the prosecutor's remarks which were in direct conflict with long standing Missouri case law. This, in spite of the statutory duty placed upon the Court to review all sentences of death to determine if the sentence imposed was "under the influence of passion, prejudice, or any other arbitrary factor." 565.014.3(1) RSMo. 1978. By its refusal to cite the prosecutor's argument as plain error the Court arbitrarily denied the Petitioner a fundamental right created by state law.

Also by statute the Missouri Supreme Court has the duty to review a sentence of death to determine whether or not it is excessive or disproportionate to the penalty imposed in similar cases. 565.014.3(3) RSMo. 1978. Only a cursory comparison of four generally dissimilar cases was conducted. Ignored by the Court were the scores of similar or more aggravated cases in which the death penalty was not imposed. Meaningful appellate review would have shown the Petitioner's sentence to be excessive and disproportionate and in violation of the Eighth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. THE MISSOURI SUPREME COURT DENIED THE PETITIONER DUE PROCESS OF LAW THROUGH ITS ARBITRARY FAILURE TO CITE THE PROSECUTOR'S SENTENCING REMARKS AS CONTRARY TO STATE LAW.

Missouri law provides that a person convicted of capital murder shall be sentenced to death or in the alternative to life imprisonment without possibility of parole for fifty years. 565.008 RSMo. 1978. During his argument to the jury on sentencing, the prosecutor called upon the jurors to consider that the Petitioner, if sentenced to life imprisonment, might be released prior to fifty years either due to a change in the law by the legislature or by virtue of a commutation of the sentence by the Governor.

No instruction was given to the jury on the subject of the possible commutation of the sentence by the Governor or of the possibility of a change in the law by the legislature. Neither the trial court nor the Missouri Supreme Court cited the prosecutor's remarks as error. Nor in fact did either court even mention the fact that they were made.

In its recent decision of California v. Ramos, ___U.S.___, 77 L. Ed. 2d (1983) this Court held that the Eighth and Fourteenth Amendments do not prohibit an instruction in the sentencing phase of capital case which informs the jury of the fact that the Governor might at some future time modify the sentence of life imprisonment without parole to a lesser sentence that would include the possibility of parole. It was noted that "our conclusion is not intended to override the contrary judgment of the state legislatures that capital sentencing jurors in

their state should not be permitted to consider the Governor's power to commute a sentence." Id. While the Missouri legislature has been silent on that specific point, the Missouri Supreme Court has not.

As early as 1947 in State v. Tiedt, 206 S.W. 2d 524 the Missouri Supreme Court condemned the comments of a prosecuting attorney concerning the possibility of pardon or parole by the new Governor or penal board. It said that such arguments were "not a legitimate subject of argument on the question of the infliction of the death penalty." Id. at 528

Later in State v. Cornett, 381 S.W. 2d 878 (Mo. 1964) the Court held that it was:

> "improper for a prosecutor in oral argument to call the jury's attention to the possibility that the defendant may be released from imprisonment by parole or some similar procedure as a reason for imposing a greater penalty to compensate for such prospective mitigation,"

Citing State v. Kaempher, 119 S.W. 2d 294 (Mo. 1983). Quoting from Coward v. Commonwealth, 178 S.E. 2d 97 (Va.) the Court went on to say that

> "The power of the Governor to pardon should not be commented upon in argument and it is plain error to tell the jury that under an established rule and in the ordinary course of events such sentence as it may impose will not be suffered but will be substantially diminished."

Likewise the court indicated that an instruction that the sentence imposed by the jury may be lessened by the executive branch of the government would be erroneous.

In State v. Lewis, 443 S.W. 2d 186 (Mo. 1969) the prosecutor suggested a sentence of life imprisonment or of fifty years confinement, because of the possibility that the parole board would effect an early release of the defendant. The Missouri Supreme Court characterized the prosecutor's comment as the "injection of the alien issue [which] was prejudicially erroneous in the circumstances of this case." Id. at 190.

The next year in State v. Rollins, 449 S.W. 2d 585 (Mo. 1970) the Missouri Supreme Court again reinterated that the question of future clemency is extraneous to a proper determination of the issue of punishment and should be of no concern to the jury. To the same effect are State v. Thomas, 625 S.W. 2d 115 (Mo. 1981) and State v. Nevels, 609 S.W. 2d 725 (Mo. App. 1980)

The Missouri Supreme Court has never held a position contrary to that maintained in the cases cited supra. It is elementary that states are free to provide greater protection in the criminal justice system than the Federal Constitution requires. And while it is true that "mere error of state law is not a denial of due process" Gryger v. Burke, 334 U.S. 728(1948) the arbitrary denial of a substantial right created by the state is a Federal Due Process violation even if the right itself is not federally guaranteed. Hicks v. Oklahoma. 447 U.S. 343 (1980) In Hicks this court held that when the state has provided for the imposition of criminal punishment subject to certain procedural protections, it is not correct to say that the denial of one of those protections is merely a matter of state procedural law. In Hicks the right denied the defendant was created by the legislature. Petitioner asserts that it is no more constitutionally acceptable to deny a defendant a right created by long standing case law.

The clear intention of the Missouri Supreme Court over the years has been to afford defendants of their state, the substantial right of protection against sentencing arguments which call upon the jury to consider the possibility of future gubernatorial or legislative action on the defendant's sentence. In the present case the Missouri Supreme Court did not

manifest a desire to overrule its long standing position in this area. Rather, it simply ignored the glaring error and completely disregarded its statutory and constitutional mandate to review each death sentence to determine whether it has been imposed under the influence of passion, prejudice or any other arbitrary factor. 565.014.3(1) RSMo. 1978 Gregg v. Georgia, 428 U.S. 420 (1980) Proffit v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas. 428 U.S. 262 (1976)

Bolstering Petitioner's contention that the right involved is substantial, is the fact that at least twenty-five of the twenty-eight jurisdictions that have considered the matter have taken a position in concert with Missouri case law. California v. Ramos, supra (Marshall J., dissenting, footnote 13). Chief among the concerns of those states is the fear that arguments that allude to possible future actions of clemency tend to be misleading, invite speculation, and inject into the capital sentencing process a factor that bears no relation to the nature of the offense or the character of the offender. Id.

"The wisdom of the decision to permit juror consideration of possible commutation is best left to the states" Id. Whether wise or not, Missouri has made its decision on the subject. It is both ironic and tragic that Missouri has arbitrarily denied the Petitioner the benefit of that decision, when the punishment at stake is so "unique." Furman v. Georgia. 408 U.S. 238(1972). Arbitrary and capricious decision making is simply invalid when applied to "a matter [as] grave as the determination of whether a human life should be taken or spared". Zant v. Stephens, ___U.S___, 77 L. Ed. 2d 235(1983)

II. a. THE SENTENCE OF DEATH IS AS TO THIS PETITIONER, EXCESSIVE AND DISPROPORTIONATE AND IN VIOLATION OF THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

b. THE PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE ARBITRARY FAILURE OF THE MISSOURI SUPREME COURT TO AFFORD PROPORTIONALITY REVIEW AS REQUIRED BY STATE LAW

This Court in Furman v. Georgia, 408 U.S. 238 (1972) found the challenged death penalty statutes violated the Eighth Amendment guarantee against cruel and unusual punishment because the statutes were applied in a discriminatory and arbitrary manner. In response to Furman, Missouri adopted new legislation with a view toward providing jurors with proper direction so that the death penalty would not be imposed in an arbitrary and capricious manner.

To further ensure that this unique penalty would not be administered in a "freakish" manner, the Missouri legislature created a system of appellate review, patterned after the Georgia statutes endorsed in Gregg v. Georgia, 428 U.S. 153 (1976), which provide among other things for the state Supreme Court to conduct a "proportionality review." That is, the Court is to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant". 565.014.3(3) RSMo. 1978.

While proportionality review by a court of statewide jurisdiction has been determined not to be a right guaranteed by the Federal Constitution, Pulley v. Harris, ___U.S.___, 1984), it remains a fundamental right afforded the defendant by the State of Missouri, and to arbitrarily deny the defendant such a right is to violate due process

of law under the Fourteenth Amendment. Hicks v. Oklahoma, 447 U.S. 343 (1980).

In addition to Petitioner's claim of denial of due process, he asserts that the death sentence imposed was excessive in view of the particular facts of his case and in proportion to the punishment imposed in similar cases.

In Solem v. Helm, ___U.S.___ 77 L. Ed. 2d 637 (1983) this Court outlined an analysis to be used in evaluating claims of excessive and disproportionate sentences in violation of the Eighth Amendment. Central to the analysis was a comparison to the sentences imposed on other criminals in the same jurisdiction. Id., at ___("if more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive"). In Pulley v. Harris, supra, the Court differentiated between the "proportionality of review" sought by the Respondent Harris (same as Missouri Statute in this case) and the type of review endorsed in Solem v. Helm, supra. The former type of review presumes the death penalty is not disproportionate to the crime but looks for disproportionality as to sentences for the same crime, while the latter review presumably looks to compare the gravity of the crime with the severity of the penalty. Pulley v. Harris, supra at ___.

Both reviews are central to the Petitioner's claims that he was denied a fundamental state procedural right and that his sentence of death is excessive under Eighth Amendment analysis. As the Missouri Supreme Court conducted neither type of review in any meaningful way, the Petitioner assumes to do so now.

The facts of the present case essentially outline the robbery of a private residence which resulted in the shooting of an elderly woman twice in the chest with a .32 calibre pistol. There is no evidence on record of

any torture, prolonged suffering, or gruesome injuries. In what proported to be a proportionality review, the Missouri Supreme Court compared the instant case to State v. McDonald, ___S.W. 2d___ (Mo. banc 1983) (robbery in which a police officer shot as he knelt before defendant), State v. Stokes, 638 S.W. 2d 715 (Mo. banc 1982) (the victim beaten, stabbed five times, strangled by apron and finally killed by manual strangulation), State v. Williams, 652 S.W. 2d 102 (Mo. banc 1983) (victim beaten by pistol, handcuffed, put in trunk of car, drowned while being shot at) and State v. Blair, 638 S.W. 2d 739 (Mo. banc 1982) (twenty-three year old female potential witness, kidnapped, robbed, beaten on head with a brick, stripped from waist up, shot in head, chest and wrist). The facts in all four of these cases wherein the death penalty was approved, are clearly more aggravated than the present case and do not constitute a valid comparison.

Apparently of no concern to the Supreme Court were those cases involving robbery/slayings in which the death penalty was not imposed. They are legion.

No comparison was made with State v. Mitchell, 611 S.W. 2d 223 (Mo. banc 1981) or the companion case of State v. Turner, 623 S.W. 2d 4 (Mo. banc 1981) in which the defendants were found guilty of two counts of capital murder committed during the course of a robbery of a liquor store. Both victims, ages seventy-two and sixty, had been stabbed; one, six to eight times and the other twelve times. Both victims were severely beaten on the head. Neither defendant received the death sentence.

Nor was there reference made by the court to State v. Royal, 610 S.W. 2d 946 (Mo. banc 1981) where the defendant during the robbery of a bank abducted an employee,

took her to a rural park and shot her three times. A life sentence was imposed.

In State v. Downs, 593 S.W. 2d 535 (Mo. 1980) the defendant was convicted of three counts of capital murder. The defendant and another entered a store to commit robbery. The husband and wife, owners of the store were shot in the head. Their eighteen year old daughter, returning home from school was pulled into the building and shot despite her pleas for mercy. The jury recommended a life sentence.

In State v. Strickland, 609 S.W. 2d 392 (Mo. banc 1981) the defendant, during an apparent robbery, bound three victims and shot them with a shot gun. The State waived the death penalty.

In State v. Chandler, 605 S.W. 2d 100 (Mo. banc 1980) the defendant and two others went to the law office of the victim and robbed him at gun point. Rather than shooting the victim and possibly attracting the attention of others, the defendants stabbed the victim in the stomach to draw his hands from his throat. Then as the victim implored God not to let the man kill him, the defendant deliberately cut the victim's throat. The defendant received a life sentence.

In State v. Fuhr, 626 S.W. 2d 379 (Mo. 1982) the defendant stabbed his forty-three year old victim twenty-nine times with a butcher knife when he robbed her. The jury recommended life sentence.

In State v. Potter, 657 S.W. 2d 694 (Mo. App. 1983) the defendant during the course of a robbery, beat a seventy year old man to death by smashing his head with the butt of a rifle. An accomplice had pushed the victim down and tied his hands. The jury was instructed to return a life sentence.

In State v. Scott, 651 S.W. 2d 199 (Mo. App. 1983) the Defendant forced his way into the home of a sixty year old female to rob the victim. While there, he tore out patches of her hair and scalp, stabbed her twenty-two times, and kicked her as she lay dying. The jury recommended life imprisonment.

Other cases involving robberies/slayings in which the death penalty was not imposed include State v. Betts, 646 S.W. 2d 94 (Mo. banc 1983) (gun shot wound to the back of the head), State v. Henderson, ___S.W. 2d___(Mo. App. 1984), (sixty year old man shot), and State v. Stith, 660 S.W. 2d 419 (Mo. App. 1983)

One of the aggravating factors cited by the jury and the Missouri Supreme Court was that the Petitioner took the life of his victim to prevent her subsequent testimony concerning the robbery. Whether specifically raised by the facts of a particular case or not, it would seem a fair inference that slayings in virtually all robbery cases are similarly motivated. Not referred to the court are the several non death penalty cases in which the desire to prevent future testimony was of prime concern to the perpetrator.

In State v. Williams, ___ S.W. 2d (Mo. App. 1983) the defendant shot a physician several times and threw him into a pit of water in his successful attempt to prevent the doctor's testimony in a forged prescription case.

In State v. Shaw, 646 S.W. 2d 52 (Mo. 1983) the defendant robbed a grocery store and killed an employee in order to avoid identification. The victim was hit in the head, knocked to the floor and stabbed ten times. To the same effect are State v. Malady, ___S.W. 2d__(Mo. App. 1984) State v. Betts, 642 S.W. 2d 604 (Mo. 1982) and State v. Patterson, 618 S.W. 2d 664 (Mo. banc 1981).

Other non death sentence murder cases of an aggravated nature not specifically involving a robbery are: State v. Holmes, 609 S.W. 2d (Mo. banc 1980) (victim stabbed over sixty times), State v. Fuhr, 660 S.W. 2d 443 (Mo. App. 1983) (victim stabbed thirty times), and State v. Hudgins, 612 S.W. 2d 769 (Mo. 1981) (forty-two year old female beaten and stabbed twenty times, six year old son strangled by extension cord), State v. Ford, 585 S.W. 2d 472 (Mo. banc 1979) (hitchhiker beaten and stabbed fifteen times, body put in well), State v. Brown, ___S.W. 2d___ (Mo. App. 1984) (seven year old girl chocked to death, then sexually molested after her mother was killed with an ax), State v. Bostic, 625 S.W. 2d 128 (Mo. 1981) (victim beaten with pipe, raped, throat stepped on, left in ditch), State v. Baskerville, 616 S.W. 2d 839 (Mo. 1981) (three counts of murder,including seven year old boy who begged for life), State v. Mercer, 618 S.W. 2d 1 (Mo. banc 1981) (victim raped twice, held hostage for more than an hour and strangled), and State v. White, 621 S.W. 2d 287 (Mo. 1981) (victim bound, sexually ravished, throat cut from ear to ear and in back of neck nearly severing head).

Apparent, from the review of the multitude of capital cases in Missouri in which the death penalty has not been assessed, is the fact that in spite of the statutory framework created in response to Furman v. Georgia, supra, the death penalty continues to be administered in Missouri as though it were a "lottery system", Id., at 293 (Brennan, J., concurring) under which being chosen for a death sentence remains as random as being "struck by lightning" Id., at 309 (Stewart, J., concurring). Cursory proportionality reviews such as those conducted by the Missouri Supreme Court in which only four of the

dozens of capital cases are cited, do nothing to dispel that notion. In spite of the holding in Pulley v. Harris, supra, it appears this Court will continue to place emphasis on "meaningful appellate review." Gregg v. Georgia, supra, Proffitt v. Florida, 428 U.S. 153 (1976), Jurek v. Texas, 428 U.S. 262 (1976). Whatever the definition of that term, it is clear it was denied the Petitioner through the Supreme Court's arbitrary failure to grant the state created right of "proportionality review."

State statutory review notwithstanding, Petitioner asserts it is equally apparent that the death sentence in this instance is excessive when analysed in terms of the Eighth Amendment. Solem v. Helm,supra, Weems v. United States, 217 U.S. 349 (1910), Robinson v. California, 370 U.S. 660 (1962), Enmund v. Florida, 458 U.S.___, 73 L. Ed. 2d 1140 (1982), Coker v. Georgia, 433 U.S. 584 (1977), Rummel v. Estelle, 445 U.S. 263 (1980) On its face Petitioner's offense seems far less aggravated than virtually all of the previous Missouri cases cited supra, especially in light of Petitioner's borderline mentally retardation. And while the motive in the present case was robbery and not revenge it is difficult to discern how the Petitioner's offense is markably more aggravated than that of Robert Godfrey (Godfrey v. Georgia, 446 U.S. 420, 1980) where the death sentence was disallowed by this Court. Petitioner asserts that the record provides no meaningful basis for distinguishing the imposition of the death penalty in this case, from the many cases in which it is not, Furman v. Georgia, supra.

The judgment of death should be reversed.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a writ of certiorari issue to review and reverse the judgment of the Supreme Court of Missouri entered herein.

Respectfully submitted,

Laurence G. Schmidt
Attorney for Petitioner
P.O. Box 156
Hillsboro, Missouri 63050
314/296-2460.

CERTIFICATE OF SERVICE

A copy of the foregoing was mailed this 15thday of February, 1984, to John Ashcroft, Supreme Court Building, Attorney General's Office, Jefferson City, Missouri 65101.

Laurence G. Schmidt

Subscribed and sworn to before me this 15th day of February, 1984.

MARY JANE LINDERER, NOTARY PUBLIC
State of Missouri, County of Jefferson
My Commission Expires October 5, 1987

Mary Jane Linderer
Notary Public

APPENDIX A

Supreme Court of Missouri

en banc

STATE OF MISSOURI,
Plaintiff-Respondent,

vs.

GEORGE CLIFTON GILMORE,
Defendant-Appellant.

No. 64024

APPEAL FROM THE CIRCUIT COURT OF OSAGE COUNTY

Honorable Lawrence O. Davis, Judge

Defendant appeals his capital murder conviction and death sentence. The statutory aggravating circumstances, supported by the evidence and serving as the basis for the death penalty, were killing for the purpose of receiving money or any other thing of monetary value, § 565.012.2(4), RSMo Supp. 1982; State v. McDonald, ___ S.W.2d ___ (Mo. banc 1983) (No. 64057, decided November 22, 1983); and killing for the purpose of preventing testimony in a judicial proceeding, § 565.012.2(12), RSMo Supp. 1982; State v. Williams, 652 S.W.2d 102 (Mo. banc 1983).

Issues raised on appeal are alleged error in: 1) allowing evidence of the victim's emotional state prior to death; 2) allowing evidence of other crimes; 3) improperly excusing a prospective juror from duty; 4) playing of defendant's videotape confession of other murders during the sentencing phase; and 5) excessive punishment.

Pro se, defendant alleges the following plain errors: 1) failing to appoint counsel within time to allow raising of defense of mental disease or defect; 2) requiring his appearance in court in leg irons; 3) failing to prove culpable mental state to support capital murder.

No error appears and the conviction and sentence are affirmed.

Defendant was obsessed with the notion that older people living in rural areas had no trust in banks but left substantial sums of money in their homes. It was that perverse vagary that led to the death of 83 year old Mary Luetta Watters of Robertsville, Missouri, and defendant's conviction for her murder.

The macabre episode begins in early August, 1979. Defendant, who lived in Dallas, Texas, with his wife and children, placed a long distance telephone call to his brother, Norman Gilmore, who was residing in Rindge, New Hampshire, asking him to join him in work in Dallas. Norman and a friend, Kirk Sebastian, left shortly thereafter for the trek to Texas and after arriving there commenced working with the defendant in some sort of used car towing, repair and resale business. Norman and Sebastian had not been in Texas for more than a few days when defendant revealed his "easy money" scheme for robbing old people. After some persuasion, Norman and Sebastian agreed to participate in the defendant's malminded venture and the three proceeded to rural areas of Franklin and Jefferson counties to scout around. After some time, with trips back to Texas, the ultimate decision was made to put defendant's plan into effect.

On their second trip to Missouri, they spotted the home of Mary Luella Watters who lived by herself in the isolated backwoods area of

Robertsville in Franklin County. Those circumstances suited defendant's plans to a "T", and his plan was put in operation.

Defendant first acquired a .32 caliber revolver from a pawn shop in Dallas.[1] Next, defendant, Norman and Sebastian traveled to Missouri a third time. After some stops for refreshment in Franklin and St. Louis counties, the three went to Mrs. Watters' home. Under the pretext of making an offer to purchase her auto, they surveyed her place. They then went into the woods for some target practice with their gun and finalized defendant's plans for the crime with defendant noting that they had "an easy job." It was in the early morning of August 24, 1979 that the three men, intent on crime, parked their pickup truck on a road in the woods and walked to Mrs. Watters' home. An encounter with a skunk which wanted to follow them caused them a brief and unexpected interlude.

Upon arriving at Mrs. Watters' house, according to plan, Sebastian cut the outside telephone wire, then all three threw rocks through the windows and banged on the door. Mrs. Watters' response was to fire her shotgun at her assailants, narrowly missing defendant's head. Gaining entry into their victim's house by kicking in the door, the three men found Mrs. Watters sitting on her bed. They demanded her money, but she had none. The invaders then completely ransacked the house and found a police scanner as the only item of value. When Sebastian inadvertently called out defendant's name,[2] defendant

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1. A .32 caliber gun was particularly selected, because of a pragmatic suggestion by defendant's wife--they had some spare .32 caliber ammunition at home.

2. Apparently Sebastian called out: "What do we do, now, George?"

stated: "Well, you know what I have to do, now." Defendant's preonceived plan called for the killing of witnesses if the names of any of the three men were spoken or if they were identified in some way.

With that, defendant stepped over to Mrs. Watters as she lay on her bed of death and shot her in the chest. When the poor lady said, "Ooh, what did you do that for?", defendant shot her in the chest again. Cause of Mrs. Watters' death was the two .32 caliber gunshot wounds to her chest which pierced her heart.

Gathering their malgained booty which consisted of the scanner, which ultimately brought $20, and Mrs. Watters' shotgun, which also netted them $20 in gasoline for their vehicle, the three men left for Texas. On the way, defendant constantly mocked Mrs. Watters' last words of anguish and remarked that: "Well, we don't have to worry about witnesses, now." On return to his Texas home, defendant related the incident to his wife and how he had killed Mrs. Watters when his name had been called out.

Police were baffled by the crime and had no clues as to the identity of the perpetrators of Mrs. Watters' killing. But defendant, seemingly deriving an almost sensual joy from telling of the crime, repeated it to a host of relatives at a family reunion.

At trial, Norman Gilmore testified for the state in exchange for a 30 year sentence for his participation in the crime. In addition to brother Norman, three relatives related the incident of the killing as told to them by defendant, and another substantiated defendant's scheme to make easy money. The testimony of all these witnesses was remarkably consistent that defendant planned the robbery and killed Mrs. Watters to erase her as a potential witness. The state's case

was extremely thorough even to the extent of presenting the Dallas pawnbroker who sold defendant the .32 caliber revolver.

Defendant's defense was kind of a mixed bag: that he had never been to Mrs. Watters' house; that he did not kill her; and that everyone who testified against him was lying. Inconsistent with the foregoing defense of not being at the crime scene, is his substantial reliance on his deprived childhood, lack of education and his borderline mental retardation range as being excuses for his participation in the crime. The two defenses are obviously not congruent.

We now address the issues raised on appeal.

First, defendant urges that the trial court erred in failing to declare a mistrial after the prosecutor asked the victim's daughter-in-law certain questions pertaining to the victim's family life and her mental and physical fitness. At least, so argues the defendant, the jury should have been instructed to disregard the context of the questions.

During trial, Mrs. Watters' daughter-in-law was asked about the number of grandchildren the victim had, how the victim occupied herself and her physical and mental condition. Objection to each of the four questions was sustained. Defendant now contends plain error by the trial court's sua sponte failure to grant a mistrial or instruct the jury to disregard the purport of the irrelevant questions.

There is no error. Aside from being granted all the relief requested, see State v. Williams, 652 S.W.2d at 110-11, defendant cannot point to any prejudice by reason of the trial court's failure to grant the drastic remedy of mistrial. After all, in a situation of this kind, the trial court possesses the proper coign of vantage

to assess any improper prejudicial effect of such questioning. State v. Lee, 654 S.W.2d 876, 879 (Mo. banc 1983). And the trial court's responses to defendant's objections were prompt. There was no abuse here of the trial court's discretion in ruling on the objections or in failing to declare a mistrial. State v. Williams, 652 S.W.2d at 11. Rulings on matters of relevancy and prejudice, which is the point of this issue, rest within trial court's discretion. State v. Berry, 609 S.W.2d 948, 954 (Mo. banc 1980).

Blood or family ties did nothing to restrict defendant's relatives from testifying about his killing Mrs. Watters. Robert Gilmore, a first cousin, testified that defendant had told of the weird scheme of getting money from old people who did not believe in banks and that he utilized his junk and used car business only as a front to go to "old people's houses" and to "check out houses". Defendant insists that the reference to "houses" also contains a reference to other crimes.[3]

Of course, reference to other crimes is tethered to rigid rules. State v. Williams, 652 S.W.2d at 110. But it would take the wildest stretch of imagination for a jury to believe on the basis of defendant's cousin's statements that the defendant had tried or been involved in similar killings such as occurred with Mrs. Watters. But if that mind wave should reach the jury, in this instance it would be no more than permissible evidence of a common scheme or plan. State v. Trimble, 638 S.W.2d 726, 732 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 838 (1983).

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3. Defendant was charged with and convicted of killings in similar type situations. State v. Gilmore, 650 S.W.2d 627 (Mo. banc 1983).

Prior to trial, the presiding judge of the judicial circuit took it upon himself to excuse one of the individuals who was scheduled to be on the jury panel. The prospective juror, a sometime police officer, had indicated that he had wanted to bring a gun into the trial. Defendant now contends that he was unfairly deprived of his right to have a qualified juror available by the action of the presiding judge in excusing the potential venireman without notice.

This excuse of the potential juror may not fit precisely within any of the categories of § 494.031, RSMo 1978 pertaining to persons entitled to be excused. But it is readily apparent that substantial discretion is afforded the circuit court regarding the judge's ruling on excusing a prospective juror. See State v. Marshall, 571 S.W.2d 768, 772 (Mo. App. 1978), particularly as to § 494.031(9), which allows the trial court to exercise its own judgment in excusing a person by reason of hardship. And see State v. Smith, 655 S.W.2d 745, 747 (Mo. App. 1983), commenting on the trial court's wide discretion in determining the qualifications of a prospective juror. Obviously, the statute is directory and not mandatory, and absent a showing by defendant of prejudice that his interests were adversely affected by failure to strictly observe the statutory provisions for excuse, there is no prejudice to him by the circuit judge's action. State v. Holt, 592 S.W.2d 759, 767 (Mo. banc 1980). We perceive absolutely no abuse of discretion by the trial court in this instance in excusing the prospective juror prior to trial. Defendant has not shown any prejudice to him by that action. There was no systematic exclusion of classes of persons such as condemned by Duren v. Missouri, 439 U.S. 357 (1979). Nor was there any bias exhibited or a denial of a

fair cross-section of the community. State v. Alexander, 620 S.W.2d 380, 385 (Mo. banc 1981). No error appears on this issue.

During the penalty consideration phase of this bifurcated proceeding for the jury's consideration, the state played a videotaped confession by defendant from another case in which he admitted a dual killing of an elderly couple, Clarence and Lottie Williams.[4]

Applying his "easy money" scheme, in the videotape defendant confesses to killing the Williams couple in much the same manner as he killed Mrs. Watters.

Notice was given to defendant that that evidence of the Williams' murders would be submitted to the jury as a nonstatutory aggravating circumstance. But under plain error, defendant contends that it was evidence of other crimes not authorized to be introduced and that its sole purpose was to fan the flames of prejudice against him.

But it was entirely appropriate under the state of the law for the jury to have before it during the penalty phase "as much information ... as possible when it makes the sentencing decision." Gregg v. Georgia, 428 U.S. 153, 204 (1976). To the same effect is Lockett v. Ohio, 438 U.S. 586, 602-03 (1978).

In this instance, defendant's conviction for the Williams' murders was not final and formal sentencing not imposed. But the jury was not told of the convictions and was shown only the videotaped confession. The information given to it was clearly relevant under Gregg and the holding of this Court in State v. Shaw, 636 S.W.2d 667,

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4. See State v. Molasky, 655 S.W.2d 663, 668 (Mo. App. 1983) pertaining to procedures for admitting videotapes into evidence.

675 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 239 (1982), which commands that the jury be given full information pertaining to the defendant, including his propensity for criminal activity, in giving consideration to imposition of the death sentence.

Defendant's argument that evidence of other crimes should not be used to convict him of the crime with which he is charged obviously does not pertain to the sentencing phase procedures in capital cases. Evidence of other convictions and crimes is appropriate for jury consideration in the second segment of the bifurcated proceedings. State v. LaRette, 648 S.W.2d 96, 102 (Mo. banc 1983); State v. Blair, 638 S.W.2d 739, 756-57 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 838 (1983). The admission of the videotape on relevancy ground was not an abuse of trial court discretion. State v. Williams, 652 S.W.2d at 113.

For himself, defendant contends that he was denied his statutory right to assert the § 552.030, RSMo Supp. 1982 defense of mental disease or defect. He alleges that when he was arraigned on August 11, 1981, the trial judge told him that an attorney would be appointed but that, in fact, counsel was not provided until 15 days later. However, it was not until March 4, 1982 that an effort was made to assert the Chapter 552 defense, especially with respect to defendant's ability to assist in his defense. The state objected to the raising of the defense as being far beyond the 10 day limitation provided for in § 552.030.2. Nevertheless, the state presented the testimony and written reports of three psychiatrists. Each of the three psychiatrists concluded that the defendant understood the nature of the charges against him and was able to assist his counsel in defense and was not

suffering mental disease or defect within the meaning of §§ 552.010, RSMo 1978, and 552.030.1.

The trial court also submitted to the jury the issue of defendant's capacity to appreciate the criminality of his conduct or whether his ability to conform to the requirements of the law was substantially impaired--an issue decided unfavorably to defendant. So the defendant has no legitimate complaint coming on the presentation and handling of the Chapter 552 defense.

Section 552.030.2 is specific in requiring a defendant to assert the Chapter 552 defense within ten days of a not guilty plea or show good cause for change of plea from not guilty to reliance on mental disease or defect. The trial court gave defendant's counsel opportunity to go through the entire arraignment proceedings after defendant had first been arraigned. Nothing was done for nearly seven months in raising mental disease or defect defense. Under the circumstances, with the evidence of defendant's mental condition before it, the trial court did not abuse its discretion in disallowing formal assertion of such defense. There was no good cause established to allow the change. State v. Haley, 603 S.W.2d 512 (Mo. 1980); State v. Collier, 624 S.W.2d 30 (Mo. App. 1981). The fact that counsel was not appointed until 15 days after defendant's not guilty plea at arraignment is not pertinent here.

Defendant's next pro se point concerns his being required to sit with leg irons attached during trial.

The trial court made note that defendant had been convicted previously of capital murder and had other capital charges pending against him. The trial court considered "that some security is

required." For that purpose, defendant sat with leg irons attached during trial and without objection. It is also evident that his legs were under the counsel table concealed from view from the jury and that at no time was he moved in the courtroom with restraints for jurors to observe.

A defendant is, of course, entitled to appear before the jury unfettered unless for good cause. But in this instance the trial court was only exercising proper discretion to maintain courtroom security under the circumstances. State v. Bolder, 635 S.W.2d 673, 687 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 770 (1983). And the record is destitute of an indication that any juror saw the restraints in place. State v. Beal, 470 S.W.2d 509, 516 (Mo. 1971); State v. Richards, 467 S.W.2d 33, 38 (Mo. 1971). No error appears in this regard.

Again, pro se, defendant urges that the state failed to prove the culpable mental state requisite to a capital murder charge.

A repeat of the evidence is unnecessary. It is sufficient to state that the evidence clearly establishes that defendant planned the "easy money" scheme to rob the victim, he intentionally shot her twice to kill her to prevent her from being a witness against his crime and that the killing was part of the deliberate plan. Although, as stated in State v. Turner, 623 S.W.2d 4, 7 (Mo. banc 1981), cert. denied, 456 U.S. 931, 102 S.Ct. 1982 (1982), "the state need not produce direct evidence of a defendant's premeditation and deliberation; instead, the mental elements establishing murder may be proved by indirect evidence and inferences reasonably drawn from the circumstances surrounding the slaying." But, in this instance, all the

requisite elements to establish capital murder were presented and proved by direct evidence.

Finally, defendant contends the punishment is excessive. In reviewing this point, we consider the elements of § 565.014.3, RSMo 1978.

First, the record suggests nothing that the sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor." State v. Stokes, 638 S.W.2d 715, 724 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1263 (1983).

Second, the evidence overwhelmingly supports the jury's finding of the statutory aggravating circumstances of § 565.012.2(4) and (12) that defendant murdered for "himself or another, for the purpose of receiving money or any other thing of monetary value," Gregg v. Georgia, 428 U.S. 153 (1976) and State v. Stokes, 638 S.W.2d at 724, and "for the purpose of preventing the person killed from testifying in any judicial proceeding," State v. Williams, 652 S.W.2d at 113.

Third, the sentence is not excessive or disproportionate, considering the crime and defendant, in comparison to State v. McDonald, ___ S.W.2d ___ (Mo. banc 1983) (No. 64057, decided November 22, 1983) and State v. Stokes, 638 S.W.2d at 724 (death penalty invoked for murder for things of monetary value) and to State v. Williams, 652 S.W.2d 102 (Mo. banc 1983) and State v. Blair, 638 S.W.2d 739 (Mo. banc 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 838 (1983) (murder to prevent a witness from testifying in a judicial proceeding).

The judgment is affirmed.

GEORGE F. GUNN, JR., Judge

All concur.
Execution date set for January 6, 1984.

Pet. No. 29

APPENDIX B

Section 565.014, R.S.Mo. 1978

Supreme court to review all death sentences, notice, contents of--findings required--assistant to supreme court authorized, duties of

1. Whenever the death penalty is imposed in any case, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the supreme court of Missouri. The circuit clerk of the court trying the case, within ten days after receiving the transcript, shall transmit the entire record and transcript to the supreme court together with a notice prepared by the circuit clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report by the judge shall be in the form of a standard questionnaire prepared and supplied by the supreme court of Missouri.

2. The supreme court of Missouri shall consider the punishment as well as any errors enumerated by way of appeal.

3. With regard to the sentence, the supreme court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

4. Both the defendant and the state shall have the right to submit briefs within the time provided by the supreme court, and to present oral argument to the supreme court.

5. The supreme court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the supreme court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the supreme court of Missouri in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

6. There shall be an assistant to the supreme court, who shall be an attorney appointed by the supreme court and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital cases in which sentence was imposed after May 26, 1977, or such earlier date as the court desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant. The court shall be authorized to employ an appropriate staff, within the limits of appropriations made for that purpose, and such methods to compile such data as are deemed by the supreme court to be appropriate and relevant to the statutory questions concerning the validity of the sentence. The office of the assistant to the supreme court shall be attached to the office of the clerk of the supreme court for administrative purposes.

7. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

83 - 6285

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE CLIFTON GILMORE, Petitioner,	)	
vs.	)	No. A-531
STATE OF MISSOURI, Respondent	)	

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, George Clifton Gilmore, who is now incarcerated in the Missouri State Penitentiary, Jefferson City, Missouri, requests leave to file the attached Petition for Writ of Certiorari to the Supreme Court of the United States without prepayment of fees and/or security therefor and to proceed in forma pauperis pursuant to 28 U.S.C. Section 1915. Leave was granted allowing Petitioner to proceed in forma pauperis by the Circuit Court of Franklin County, and the Supreme Court of the State of Missouri. The Petitioner's affidavit in support of this Petition is attached hereto.

Respectfully submitted,

Laurence Q. Schmidt
Attorney for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

GEORGE CLIFTON GILMORE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. A-531
	)	
STATE OF MISSOURI,	)	
	)	
Respondent	)	

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED ON PETITION FOR WRIT OF CERTIORARI
IN FORMA PAUPERIS

I, George Clifton Gilmore, being first duly sworn, depose and say that I am the Petitioner in the above-entitled cause; that in support of my motion to proceed on the attached Petition for Writ of Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; that I believe that I am entitled to redress; and that I have previously filed motions to proceed in forma pauperis in Missouri State Courts and leave to proceed was granted by every court that has entertained said motions.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received.

ANSWER: No. Dec. 1980 4000.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source.

ANSWER: No.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

ANSWER: No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximate value.

ANSWER: No.

5. List the persons who you are dependant upon for your support and state your relationship to those persons.

ANSWER: None

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

George Gilmore
George Clifton Gilmore
Petitioner.

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

Subscribed and sworn to before me this _____ day of FEB 10 1984, 1984.

Billy E Patterson
Notary Public

BILLY E PATTERSON
NOTARY PUBLIC STATE OF MISSOURI
COLE CO.
MY COMMISSION EXPIRES SEPT 20 1988

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 83-6285

OCTOBER TERM, 1983

GEORGE CLIFTON GILMORE,

Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

Respectfully submitted,

JOHN ASHCROFT
Attorney General of Missouri

JOHN M. MORRIS, III
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CONSTITUTIONAL PROVISIONS AND STATUTES

Section 565.014.3(3), RSMo 1978, reads as follows:

> "3. With regard to the sentence, the supreme court shall determine:
> "(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
> "(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and
> "(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

STATEMENT OF THE CASE

Petitioner George Clifton Gilmore was convicted of capital murder, §565.001, RSMo 1978, and received the sentence of death for the murder of an elderly woman, Mary Watters, committed for the purpose of theft. The facts relating to this offense are fully set out in the opinion of the Supreme Court of Missouri affirming petitioner's conviction and sentence, State v. Gilmore, 661 S.W.2d 519 (Mo. banc 1983), and will not be restated here.

The facts and circumstances bearing upon petitioner's request for certiorari are as follows:

During the penalty phase of the trial, the prosecutor argued, in part, to the jury:

> ". . . and also you have absolutely no guarantee that the legislature down the road, here, won't change its mind, that they won't pass another law saying that you can let someone who has been convicted like this defendant out of jail before the fifty years are up, or the governor could commute his sentence" (Tr. 765).

No objection was made by petitioner's trial counsel; nor was error alleged in the motion for new trial; nor was any complaint regarding this instance raised on appeal to the Supreme Court of Missouri. Accordingly, petitioner's theory regarding improper argument has never been presented to any Missouri court.

Petitioner raised his claim regarding a lack of proportionality of his death sentence to the Missouri Supreme Court, which considered and rejected petitioner's allegations. At no time did petitioner claim his death sentence was cruel and unusual punishment and a violation of the Eighth Amendment to the United States Constitution.

ARGUMENT

Petitioner's first issue asserts that the Supreme Court of Missouri failed to declare erroneous, under state law, the prosecutor's statement regarding possible parole or clemency. Certiorari on this ground should be denied for two reasons. The first, as petitioner correctly notes, is that no federal constitutional claim is stated. California v. Ramos, ___ U.S. ___, 103 S.Ct. 3446, ___ L.Ed.2d ___ (1983).

The second is that the issue of the prosecutor's comments has never been raised in a Missouri court. As petitioner admits, no objection was made at trial (Petition, p. 4). Further, this issue was not briefed on appeal to the Supreme Court of Missouri by either petitioner's appellate attorney or by petitioner himself. The Supreme Court of Missouri makes no reference to the issue in its opinion, 661 S.W.2d 519 (Mo. banc 1983).

As this Court has observed,

> "It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system (citations omitted)."

Webb v. Webb, 451 U.S. 493, 496-497 (1981).[1]

Petitioner's other complaint states, in sum, that the Supreme Court of Missouri did not reach the correct result when considering the proportionality of the sentence in accordance with Missouri law, § 565.014.3(3), RSMo 1978. As petitioner properly notes, there is no constitutional requirement that this proportionality review exist, Pulley v. Harris, ___ U.S. ___, 104 S.Ct. 871, ___ L.Ed.2d ___ (1984).

Petitioner's claim that he was denied review is difficult to fathom, as the Missouri Supreme Court clearly found that the sentence was proportional, 661 S.W.2d at 525. His claim that no

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[1]Although this could be demonstrated by production of the state court records and briefs, it is also manifest from the fact that the present theory was not addressed in the opinion of the Missouri Supreme Court. Where "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary (citations omitted)." Street v. New York, 394 U.S. 576, 582 (1969).

review was undertaken is devoid of support in the record. Rather, it is clear that petitioner's real complaint is the result of the analysis of the Missouri Supreme Court. He cites numerous other Missouri cases where the death penalty was not received by the defendant.

In doing so, petitioner understandably fails to mention that besides the crime for which he was convicted, he has been found guilty of several other murders: petitioner was convicted of the murders of Clarence and Lottie Williams, State v. Gilmore, 650 S.W.2d 627 (Mo. banc 1983), although it should be noted that those convictions were reversed due to a typographical error in the indictment. Respondent would note that petitioner's confession to the murders of Mr. and Mrs. Williams, which was introduced at trial against him, is the subject of his main point before the Missouri Supreme Court. Petitioner has also been convicted of murder for the killing of Elizabeth Roderique, for which he received a life sentence, and was convicted for the murder of Woodrow Wilson Elliott, for which he also received the death penalty. The youngest of petitioner's five victims, Mr. Elliott, was 65-years-old and a dwarf paraplegic. The Missouri Supreme Court is well familiar with petitioner's many murderous attacks upon the elderly and defenseless, and although not explicitly mentioned by the court, this fact was clearly considered by the court in considering the "crime and the defendant." Section 565.014.3(3) (emphasis supplied). The fact that petitioner merely disagrees with the state court finding in regard to proportionality does not mean that a constitutional issue is raised. The decision of the Missouri Supreme Court regarding proportionality is one of state law, and no constitutional question is raised.

Finally, in regard to petitioner's claim that the death penalty is cruel and unusual punishment, as applied to him, respondent submits there are few cases where the death penalty is more deserved. Petitioner undertook a long, violent campaign against the old and helpless for the sole purpose of monetary

pain, which has resulted in five deaths. His assertion that he is being subjected to cruel and unusual punishment is frivolous and should be summarily dismissed.

CONCLUSION

For the reasons herein stated, respondent respectfully submits that the Petition for Certiorari be denied.

Respectfully submitted,

JOHN ASHCROFT
Attorney General

John M. Morris III

JOHN M. MORRIS, III
Assistant Attorney General

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that a true and correct copy of the Respondent's Response to Petition for Writ of Certiorari in the case of George Clifton Gilmore v. State of Missouri was mailed, pursuant to Supreme Court Rule 28.59b), postage prepaid, this 16th day of March, 1984, to:

Lawrence C. Schmidt
Public Defender
23rd Judicial Circuit
Hillsboro, Missouri 63050

John M. Morris III by Sue Bower

JOHN M. MORRIS, III